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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN FISH CARTER, Defendant and Appellant.	B300561 (Los Angeles County Super. Ct. No. NA105246)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard M. Goul, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Kenneth C. Byrne and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant John Fish Carter was convicted by a jury of three counts: (1) attempted voluntary manslaughter in the heat of passion; (2) shooting at an occupied vehicle; and, (3) unlawful ßpossession of a firearm. The jury found true allegations he personally used a firearm in the commission of the first count and possessed a firearm in commission of the third count (Pen. Code, §§ 12022.5, subd. (a), 29800, subd. (a)(1)) and that he personally used a firearm, and caused great bodily injury, as to the second count (Pen. Code, § 12022.53, subds. (b), (c), & (d)). The court sentenced him to prison for 32 years to life.

We affirm. The *Trombetta*[1] motion was properly denied as there was no evidence the police officers acted in bad faith in electing not to conduct a gunshot residue test. Introduction of the victim's police interview at trial did not deprive Carter of his constitutional right to confrontation because the victim was subject to cross-examination. Although the trial court mistakenly gave CALCRIM No. 2.50 rather than CALCRIM No. 2.51 (or a properly constructed CALCRIM No. 252), any error was harmless. The court did not abuse its discretion in imposing the upper term and refusing to strike the enhancement under Penal Code section 12022.53, subdivision (d); and, the alleged Eighth Amendment violation and order to pay $150 in attorney fees were waived.

FACTS

On October 30, 2016, Bennie Robinson was walking towards the cashier at a gas station in Long Beach when he got

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1 *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*).

into an argument with Carter who was walking away from the cashier. The verbal dispute escalated, and as Robinson started to drive away Carter shot at his vehicle five times shattering the rear window and hitting Robinson in the back of the head. Robinson's and Carter's recollection of the events leading up to the shooting differed significantly.

As Robinson told it, he asked how things were going as defendant passed by, but defendant responded with a gang question, "What's up blood?" When Robinson went back to his car, defendant came by "talking shit" and challenging him to fight. Defendant had something "clutched" in his hand, so Robinson quickly got in his car and started to drive away. He then heard shots. One went through the rear window and struck him in the head. When asked by the police, Robinson denied having a gun.[2]

Carter told the jury that as they passed Robinson said, "What was cracking?" and Carter responded, "What's bracking?" This means "What's up?"; but Crips say it with a "c" and Bloods say it with a "b." He answered in gang language out of habit even though he was no longer in a gang. As defendant went to his car he heard, "Hey, where you from?" He answered that he did not want any problems and "it's all good." But Robinson continued, "You're in Crip city, you need to know where you are." Robinson then moved his hands towards his waist and said, "I got something for you, cuz." Knowing that meant violence, defendant

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[2] As discussed in Section II, *post*, this evidence came from Robinson's recorded police interview. It was played to the jury after the trial court found Robinson's in-court testimony willfully "evasive."

retrieved a gun from under the hood of his car. After making sure Robinson could see he was clutching something Carter said, "They didn't stop making guns when they made yours." As Robinson started to drive off, he leaned out the window screaming, "I'll be right back, cuz. Y'all going to get it." He then stopped; his arm came out with a gun, and he shot. Defendant, having moved to a safer location, returned fire. He saw Robinson speed off after the rear window shattered.

DISCUSSION

I The *Trombetta* Motion Was Properly Denied

Carter filed a pre-trial motion to dismiss under *Trombetta*. He alleged the police had impounded Robinson's vehicle but had never conducted a gunshot residue test even though there was reason to believe the test would provide him with exculpatory evidence. If there was gunshot residue in or on Robinson's vehicle, it would support his claim that he returned fire in self-defense. The motion was denied.

It is well established that, "Law enforcement agents have a constitutional duty to preserve evidence, but that duty is limited to 'evidence that might be expected to play a significant role in the suspect's defense.' [(*Trombetta*, *supra*, 467 U.S. at p. 488.]) To reach this standard of 'constitutional materiality,' the 'evidence must both possess an exculpatory value that was apparent before [it] was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*Id.* at p. 489; accord, [citation.].)

"The defendant bears a higher burden to establish a constitutional violation when 'no more can be said' of the evidence 'than that it could have been subjected to tests, the results of which might have exonerated the defendant.' [Citation.] In such cases, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Citation.] The assessment of bad faith 'must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.' " (*People v. Flores* (2020) 9 Cal.5th 371, 394.) Carter did not meet his burden.

Detective Ricardo Solorio of the Long Beach Police testified at the hearing that he interviewed defendant within hours of the incident and knew he was claiming self-defense. "[Carter] said he saw something in [Robinson's] hand, believed it was a chrome firearm, and that [Robinson] shot at him." When asked what the police did in response to that claim, Solorio said the police looked at the totality of the circumstances and took "into account witness statements, evidence found at the scene, victim statements, suspect statements. Based on the totality of the circumstances in this investigation, we were able to determine that [Carter] was the one that shot and not Mr. Robinson."

With a search warrant in hand, the police examined Robinson's vehicle within days of the shooting but did not find evidence of anyone shooting from the car. They looked for burn marks and bullet marks that would indicate a bullet was fired from inside the car, as well as expended cartridges. The police did find two live bullets in the victim's vehicle, but Robinson explained he had found them earlier that day in a local park and

did not want any children to find them. His vehicle was released from police impound a week later.

Solorio also examined Carter's vehicle, inside and out, with a search warrant looking for any bullet holes that would indicate he had been fired on. No strike marks were found on Carter's vehicle. The police also canvassed the crime scene for strike marks but did not find anything. Robinson had driven from the gas station to a fast food restaurant a block and a half away. The police canvassed from the shooting scene to the fast food restaurant location where the victim stopped. Nothing, including any firearm, was found or recovered along that route.

The police reviewed the surveillance video from the gas station. It showed Carter and the occupants of his vehicle. None of them displayed any body language indicating they were being fired upon. Solorio stated that, "From my training and experience, when you're being fired upon, your body reacts a certain way. You either flinch or flee. And there was no body language indicating that they were being fired upon." The video showed Carter's wife standing outside the vehicle, but her upper half was leaning inside the vehicle. When she looked in the direction of the shooting area "it looked like she was upset because she threw the gas nozzle against the car." He conceded the video did not show the victim's vehicle when the shots were fired but the occupants in Carter's vehicle did not react like they had been shot at.

The police looked at witness statements. The gas station clerk never said Robinson fired at Carter, and the fast food restaurant's employee never said Robinson had a firearm or discarded one. The police interviewed the two passengers in

defendant's vehicle, including Carter's wife. Neither of them indicated that Robinson had fired a gun at all.

Finally, Solorio stated that gunshot residue tests are done on a "case-by-case" basis. "[I[]f the detective sees the need for G.S.R. testing should be done, then we'll summons [*sic*] a lab technician who is G.S.R.-qualified." There was no reason here to call in a lab technician. The detective did not know defendant before this incident and had no "personal bad feelings" towards him. The court found defendant had not demonstrated a reasonable likelihood of gunshot residue being found on the vehicle, nor that the police had acted in bad faith.

Carter first argues we must review the entire record, including testimony at trial, to determine whether the trial court properly denied the motion. However, his reliance on *People v. Alvarez* (2014) 229 Cal.App.4th 761 is unpersuasive. In that case, there was no trial; the motion to dismiss was granted after an evidentiary hearing. (*Id*. at pp. 764, 767–771.) A case is not authority for a proposition not considered. Carter then recasts the argument: The court obviously erred because the jury believed, in part, his story about the events. True, the jury convicted him of the lesser included offense of attempted voluntary manslaughter rather than the charged crime of attempted murder. What the jury may or may not have believed at trial, however, is irrelevant when reviewing a pre-trial motion. He then argues this case "shares several features with the facts" in *U.S. v. Zaragoza-Moreira* (9th Cir. 2015) 780 F.3d 971. Not only are we not bound by that federal decision, but that case dealt with the destruction of video evidence of the event. It did not deal with, as here, the alleged failure to conduct testing of

evidence, which places on a defendant a higher burden of proof. (See *People v. Flores*, *supra*, 9 Cal.5th at p. 394.)

The record here demonstrates the police actively looked for evidence that would support Carter's version of events—including canvassing the crime scene, reviewing surveillance footage, interviewing witnesses, and searching both vehicles for strike marks and other similar evidence—but did not find anything. Arguments that they should have done more, or that they should have known the independent witnesses were not being truthful, is not the standard. And even if we were to consider the trial testimony and the jury's verdict, Carter still did not meet his burden to show there was a likelihood that there would have been gunshot residue in Robinson's vehicle and that the police acted in bad faith in not conducting the gunshot residue test. The evidence that Robinson shot first was mostly self-serving and the jury clearly rejected Carter's self-defense claim. The *Trombetta* motion was properly denied.

II **There Was No Confrontation Clause Violation**

The trial court allowed the prosecution to play the recorded police interview to the jury pursuant to *California v. Green* (1970) 399 U.S. 149. We find no error.

Robinson was called to testify at trial. Initially he answered the questions directly: He admitted he went to the gas station that night where "[t]here was a guy coming from—I believe he was paying for his gas as well and we kind of crossed paths like this and I spoke to him. I said, 'How you doing, bro?' " But when he was shown People's exhibit 1, a copy of the surveillance video, his answers became less certain. Asked if that was him in the white shirt, he said, "I can't—I can't see the face." He could not "recall" if he went up to the cashier and he

could not tell if the vehicle driving away was his: "Can't tell from the color, but looks like it could be." He could not remember if the video showed the gas station where the incident occurred. As he stated, "I recall having a discussion with someone, but I don't—it was two-and-a-half years ago. I was hit in the back of the head. I don't really remember too much of that night."

Over the next 12 pages of direct examination, Robinson provided incomplete responses. He admitted there was an altercation at the gas station and he then left. The next thing he remembered was his "head ringing and the paramedics taking [his] clothes off." He remembered being in the hospital and talking with "somebody" but was unsure if they were the police or, for the most part, what he told them. However, he denied telling the police he saw Carter clutching something or that he was ducking down in the driver's seat because Carter was clutching something. He said, "No, that's not what happened, no." He denied being a gang member or ever being in a gang.

Robinson also said he could not remember much of the interview with the police a few days later. When asked if he had spoken to the detectives, he said, "I believe so." He admitted he was taken down to the police station and could only say the six-pack of a photographic line-up "looks familiar." He admitted the initials under the one photograph were his, but when asked if he had "circled it," he responded, "That is not a circle." Asked if he made the mark, a half-circle, he said, "I don't recall making that, but that's not a circle." When shown a picture of himself, he said, "Appears to be me. I believe I am more handsome than that guy." Robinson than criticized a copy of his signature on one document, saying, "My writing is better than that." When the prosecution

suggested that, "You had just been hit in the head; right?" He responded, "Allegedly."

His responses on cross-examination were similar but even less specific. He could no longer recall going to the gas station that night, why he went there, or what happened. He said his "memory is not what it used to be." Robinson again said he could not identify himself on the video because it was too fuzzy. When asked if he remembered saying "this was Crip city" or the term "20 Crip" to anyone that night, he said, "Not at all." He explained that, "Like I said, I was struck in the back of the head. It was about three years ago. I don't remember much." The cross-examination then turned to the key issue.

"[DEFENSE COUNSEL]: Do you recall telling the man at the gas station on October 30, 2016, that you had something for him?

"A. Not at all, no.

"Q. You don't recall telling a man at the gas station on October 30, 2016, 'Stay right there, I have something for you'?

"A. No.

"Q. Isn't it true you then got in your car, drove a little bit, stopped, and pulled out a firearm, Mr. Robinson?

"A. No.

"Q. You didn't or you don't recall doing it?

"A. I don't recall any of that.

"Q. Okay. So you are not sure either way?

"A. I don't own a firearm.

"Q. My question is, did you not do it or you don't recall doing it?

"A. I'm telling you I don't own a firearm.

"Q. You are saying you couldn't have done it?

"A. I am telling you I don't own a firearm.

"Q. Do you recall?

"A. I am telling you I don't own a firearm.

"Q. That is not my question. Did you pull out a firearm and shoot at Mr. Carter on the night of October 30th?

"A. Are you serious?

"Q. I think so.

"A. I don't own a firearm.

"[THE COURT]: You need to answer the question 'yes' or 'no'.

"THE WITNESS]: No.

"[DEFENSE COUNSEL]: No or you don't recall?

"A. I don't recall any of that.

"Q. Okay. So you are not sure whether you did it or not?

"A. You're not trying to mix me up, are you?

"Q. Mr. Robinson, it sounds like you don't remember a lot; right?

"A. I don't think you'd remember a lot if you were shot in the back of the head."

On re-direct examination, Robinson was again asked if he owned a gun. He said no. The prosecution then asked, "You didn't have one that night?" Robinson answered, "Correct." He also denied "ever" owning a gun.

Out of the presence of the jury, defense counsel moved under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) to exclude Robinson's out-of-court testimony as hearsay; he claimed the defense did not have a "meaningful opportunity to cross-examine based on Mr. Robinson's evasiveness." The motion was denied. After finding Robinson was being "willfully deceptive" and "refusing to answer questions of both you and the People,"

the trial court allowed the prosecution to play the video of the police interview pursuant to *California v. Green*. Carter contends this was error.

"The United States Supreme Court has made clear that admitting prior statements of a witness who testifies at trial and is subject to cross-examination does not violate a defendant's confrontation rights." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 632; *People v. Cowan* (2010) 50 Cal.4th 401, 463.) Moreover, while the *Crawford* line of cases has changed constitutional confrontation law, "*Crawford* itself 'reiterate[d] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.' " (*Rodriguez*, at p. 632.) Here, Robinson was subject to cross-examination. Therefore, the court did not abuse its discretion under constitutional standards in allowing the police interview into evidence. (*People v. Homick* (2012) 55 Cal.4th 816, 859 [standard of review is abuse of discretion].)

Carter's assertion that while Robinson may have been subject to cross-examination, he was still deprived of the opportunity to conduct "effective" cross-examination because Robinson refused to answer questions is unavailing. The premise that Robinson *refused* to testify on cross-examination is belied by the record. He answered a few questions directly. For many questions he said he did not recall and blamed his lack of recollection on the injury: He was struck in the head by a bullet fired from Carter and simply could not remember what happened

that night.[3] But key to this case is that Robinson expressly denied having a gun that night: Without a gun in his possession he could not have fired on Carter.

A defendant is denied effective cross-examination when a witness refuses to answer any questions. (*Douglas v. Alabama* (1965) 380 U.S. 415, 419–420.) But there is no confrontation clause violation if the witness is unable to remember the events or feigns memory loss. (*United States v. Owens* (1988) 484 U.S. 554, 559–560; *People v. Cowan, supra,* 50 Cal.4th at p. 468.) Here, the trial court concluded Robinson was feigning memory loss and that conclusion is supported by the record. The jury had the opportunity to assess Robinson's demeanor and credibility and to decide what weight, if any, to give his testimony about not having a gun or firing any shots. Carter argues, however, that this case is similar to *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932 where the reviewing court found a confrontation clause violation when the key child witness answered some questions about the crime but refused to answer the important ones. (*Id.* at pp. 965–968.) But that case was, at its core, a refusal case. Moreover, there was no corroborating evidence of sexual abuse and the defendant had been acquitted of the other two counts. (*Id.* at p. 969.) This case is much different. First, Robinson answered the important question: He denied

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[3] The prosecution offered another possible explanation in closing. Reminding the jury that Robinson was in custody, the prosecution suggested he was being "very careful when he is on this stand facing down the defendant not to say anything that could hurt the defendant, that could get [him] mad. Because remember our gang expert, she was talking about snitches."

having a gun that night. Moreover, Carter admitted shooting at Robinson, and his self-defense argument was rejected by the jury.

We find no constitutional violation here. (*People v. Homick*, *supra*, 55 Cal.4th at pp. 861–862 [court properly allowed playing of entire police interview].)[4]

III The Instructional Error Was Harmless

Carter argues, and the Attorney General concedes, that the trial court improperly instructed the jury as to Count 2, which charged him with felony shooting at an occupied vehicle pursuant to Penal Code section 246. Despite the consensus, we review the propriety of jury instructions de novo. (*People v. Rodriguez* (2019) 40 Cal.App.5th 194, 199.)

The court instructed the jury that Count 2 only required general intent. To establish an offense under that section, the prosecution must prove, in part, that the firearm was discharged "maliciously and willfully." (Pen. Code, § 246.) Although this offense is a general intent crime (*People v. Ramirez* (2009) 45 Cal.4th 980, 985, fn. 6), because an element of the offense requires it be committed "maliciously," the court cannot instruct with CALCRIM No. 250 (Union of Act and Intent: General Intent) but, instead, must instruct with CALCRIM No. 251 (Union of Act and Intent: Specific Intent or Mental State). (See *People v. Jo* (2017) 15 Cal.App.5th 1128, 1160.)

Here, the trial court instructed the jury with CALCRIM No. 252 (Union of Act and Intent: General and Specific Intent Together). Critically, as to "Counts 2 and 3 and all other

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[4] We reject Carter's assertion that this a mixed question of law and fact that requires *de novo* review.

allegations," the jury was instructed that those crimes "require a general intent or mental state. For you to find a person guilty of these crimes, that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act; however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime." This instruction was requested by the prosecution, and Carter concedes he did not object. But as *Jo* holds, it was error to give this instruction. (*People v. Jo*, *supra*, 15 Cal.App.5th at p. 1160.)

Instructional error does not require reversal of the judgment. "Instead, an erroneous instruction that omits an element of an offense is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) The test is whether it is " 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " (*Ibid.*) We find under that standard that the instructional error here was harmless.

First, the court also instructed the jury with CALCRIM No. 965. This instruction provided in relevant part that, "The defendant is charged in Count 2 with shooting at an occupied motor vehicle in violation of Penal Code section 246. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully and maliciously shot a firearm; [¶] AND [¶] 2. The defendant shot the firearm at an occupied motor vehicle; [¶] AND [¶] 3. The defendant did not act in self-defense. [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose. [¶] Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or

she acts with the unlawful intent to disturb, annoy, or injure someone else." This instruction clearly stated that an element of the offense is that the defendant must have acted maliciously. It also defines what the term "malicious" means.

Second, there was no dispute that Carter fired at Robinson and the jury rejected his claim of self-defense. According to Baylee Bradford, the cashier at the gas station, she saw Robinson drive away from the gas station and turn right. She also saw Carter run after him and fire several shots. The only shots she heard came from Carter, and she never saw Robinson with a gun. Her testimony was corroborated by the gas station surveillance video that showed Carter running to the corner of the gas station to shoot and no one reacting as those bullets were coming the other way. Even Carter admitted in his testimony that he moved away from his vehicle to another location before he shot.

Carter suggests that the jury was confused by the instructions because it asked what was the difference between the Count 2 charge under Penal Code section 246, and the lesser included charge under Penal Code section 246.3. But the court directed them to "compare elements listed in jury instructions for each charge." This forced them to re-read CALCRIM No. 965 and review the element of the offense that required the defendant to have acted maliciously.

From a review of the entire record, we conclude the error was harmless. It is clear beyond a reasonable doubt that a rational jury would have found Carter guilty of Count 2 if they had been properly instructed. The evidence showed him running after Robinson, shooting at the car as it was turning, and firing five rounds until the rear window shattered.

IV **Sentencing Issues**

The court sentenced Carter to a total aggregate term of 32 years to life. The court imposed the upper term of seven years on Count 2 (shooting at an occupied vehicle); the midterm of two years, to run concurrently, on Count 3 (possession of a firearm by a felon); and, the upper term, stayed pursuant to Penal Code section 654, on Count 1 (attempted voluntary manslaughter). As to the firearm enhancement on Count 2, discharging a firearm causing great bodily injury, the court sentenced him to 25 years to life.

A. *The Upper Term / Firearm Enhancement*

Carter argues the court improperly used dual facts to impose the upper term on Count 2. Although the elements of the crime may not be used as aggravating factors to impose the upper term, a trial court is not precluded from "using facts to aggravate a sentence when those facts establish elements not required for the underlying crime." (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562, italics omitted.) Here, the court explained its reasons for imposition of the upper term: "The court focuses upon the actual decisions of the defendant that evening. Where this was not one shot fired to a man who he was staring in the eye who had threatened him. This was five shots fired into a car driven away by Bennie Marquee Robinson. And Mr. Robinson was shot in the back of the head as he drove away trying to flee. At that point he was no threat to the defendant. It was pure retaliation or pure anger or pure violence for the sake of violence." The factors cited clearly focus on facts that exceed the elements of the crime, and any one of these aggravating factors was enough to support imposition of the upper term. There was no impermissible dual use of facts.

Carter then argues the court abused its discretion in refusing to strike the firearm enhancement. (Pen. Code, § 12022.53, subd. (d).) That subdivision provides in relevant part: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, . . . personally and intentionally discharges a firearm and proximately causes great bodily injury . . . to any person . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." The court has the discretion to strike or dismiss a firearm enhancement "in the interest of justice pursuant to [Penal Code] Section 1385." (Pen. Code, § 12022.53, subd. (h).) Carter argued below that the facts supported the striking of the enhancement: He had no real criminal history; the shooting was in response to a provocation and an honest belief in his right to self-defense; the injuries suffered by Robinson were on the lower end of seriousness when compared to other situations involving great bodily injury; he was gainfully employed at the time of the crime; and "[a]n indeterminate twenty-five years to life enhancement would be a wildly excessive and unjust punishment for the conduct found true by the jury."

The trial court stated it understood it had the discretion to strike the firearm enhancement. It agreed that Carter had a "minimal" prior criminal history and did not use that as an aggravating factor. However, it did find the other aggravating factors—such as running to a better location to fire five shots at a fleeing vehicle—strongly counseled against striking the enhancement. We conclude from our review of the record that the court did not abuse its discretion in refusing to strike the firearm enhancement.

B. *The Sentence is Not Cruel and Unusual Punishment*

Next, he argues that under the Eighth Amendment to the United States Constitution the sentence of 32 years to life is cruel and unusual punishment under the facts.

The Attorney General argues, and Carter concedes, that this discrete issue was not raised in the trial court. It has therefore been forfeited. (*People v. Rodriguez*, *supra*, 40 Cal.App.5th at p. 203 [cruel and unusual argument forfeited]; *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247.) Relying on *People v. Yeoman* (2003) 31 Cal.4th 93, 117, Carter argues that where the argument on appeal is a "restatement" of an identical appellate claim then the reviewing court should consider the claim even though it was not raised in the trial court. However, unlike *Yeoman*, where the jury selection issues on appeal were functionally the same, the issues here are not. The claim has been forfeited and cannot be saved under *Yeoman's* limited exception.

Even when the issue has been forfeited, appellate courts often consider the Eighth Amendment argument anyway under the rubric that it forestalls a later ineffective assistance of counsel claim. Whether this court should exercise its discretion to engage in that analysis here is problematic. There are some factual issues that were not fully resolved—such as whether there were members of the public on the streets during the shooting. Carter says no, but in closing the prosecution pointed out that the surveillance video showed some. In the briefs on appeal, Carter premises his argument in some places on the incorrect assertion that the jury rejected the prosecution's claim "appellant committed first degree murder" while at the same time conceding that the "shooting at an inhabited dwelling is a

weighty crime." No one was killed, and Carter was convicted of shooting at an occupied vehicle, not an inhabited dwelling. Inconsistencies aside, we exercise our discretion to consider the claim.[5]

The thrust of his claim is that the imposition of a sentence of 25 years to life for the firearm enhancement is cruel and unusual under these facts. Carter highlights the fact the jury convicted him of the lesser included offense of attempted voluntary manslaughter in the heat of passion rather than the charged offense of attempted murder. He also points out the sentence here is around the same as a conviction for second degree murder.

In considering an Eighth Amendment challenge, "[t]he judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) The facts are viewed

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[5] There is another reason to consider it. Defense counsel argued below, albeit relative to the motion to strike the firearm enhancement, that an "indeterminate twenty-five years to life enhancement would be a wildly excessive and unjust punishment for the conduct found true by the jury." The failure to say "Eighth Amendment" should not bar a claim that functionally raises the basic constitutional argument. We note there is no claim of ineffective assistance of counsel raised on appeal as to this issue.

"in the light most favorable to the judgment"; but whether the "punishment is cruel and unusual is a question of law for the appellate court." (*Id.* at p. 496.)

The claim that the sentence is cruel and unusual begins by comparing the gravity of the offense and the severity of the sentence and, if that is shown, it then moves on to a comparison of sentences received by other defendants in this and other jurisdictions. (*People v. Baker* (2018) 20 Cal.App.5th 711, 733.) To succeed on this first step, the sentence must be, as a matter of law, so disproportionate to the crime committed that it "shocks the conscience and offends fundamental notions of human dignity." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085; see also *In re Lynch* (1972) 8 Cal.3d 410, 424.)

Carter conceded at trial he was a felon in possession of a firearm. As a result, he was convicted in Count 3 of a violation of Penal Code section 29800, subdivision (a)(1). He had hidden the weapon under the hood of his vehicle where it was readily available for use in a public setting. When he became enraged at Robinson, he pulled the weapon from under the hood and threatened him with it. There was no credible evidence Robinson fired first, and the jury clearly rejected Carter's claim of self-defense. Thus, the evidence was that as Robinson drove away, and no longer a threat, Carter moved to a place at the gas station where he fired five shots at Robinson. One hit the rear window, which shows he was aiming at him. The bullet slowed down enough because it hit the window first, so when it hit the back of Robinson's head it did not have enough velocity to penetrate his skull. Carter put the two occupants of his vehicle, the cashier, and other members of the public at risk of being hit by stray gunfire. It was also incredibly dangerous to fire a weapon while

he was in a gas station where a stray bullet or casing could ignite highly flammable fuel.

All in all, there is nothing constitutionally disproportionate about the sentence including the imposition of the firearm enhancement, under these facts. The Legislature has seen fit to establish a graduated system that punishes an offender based on level of the severity of the crime. It has made the shooting at an occupied vehicle that results in great bodily injury subject to the highest penalty of 25 years to life.

V Attorney Fee Order

Carter complains that he was ordered to pay $150 in attorney fees pursuant to Penal Code section 987.8, subdivision (b), without any showing of a current ability to pay. At the sentencing hearing, the court ordered Carter to pay these attorney fees; the minute order reflects the order imposing attorney fees, and that "all fees payable through the Department of Corrections."

Carter did not object to the imposition of the attorney fee or request a hearing on his current ability to pay. The issue has thus been forfeited. (*People v. Rodriguez*, *supra*, 40 Cal.App.5th at p. 206.) Citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1215, Carter argues this issue cannot be waived by the public defenders' failure to object because it involves his "own fees," and thus defense counsel had a conflict of interest. But in that case, it was defense counsel that demanded that the court impose the fees. (*Id.* at p. 1193.)

Given the length of his sentence, if there was any error it was harmless beyond a reasonable doubt because there was evidence of a current ability: He had a job during trial, worked overtime, and owned a vehicle. Moreover, he will also likely have

the opportunity during his confinement to pay this and the other fees imposed. (*People v. Oliver* (2020) 54 Cal.App.5th 1084, 1101; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1077.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SALTER, J.*

We concur:

BIGELOW, P. J.

WILEY, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.